

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

***** X

BERIAM ORTIZ

AFFIRMATION IN
OPPOSITION TO
MOTION OF
PLAINTIFF AND
CROSS MOTION OF
DEFENDANT
SHERMAN

Plaintiff(s)

Docket No.: 07 CV
10365

- against -

ERIN KATHALEEN BARLOW, TOYOTA MOTOR CREDIT., and
CAROL SHERMAN

Honorable
Judge Chin

Defendant(s)

***** X

LORETTA J. HOTTINGER, an attorney duly licensed to practice law in the Courts of the State of New York, hereby affirms under the penalties of perjury as follows:

That your Affirmant is associated with NEIL L. KANZER, ESQ., the attorney for the Defendant, ERIN KATHLEEN BARLOW (“BARLOW”), in the above entitled action, and as such, is fully familiar with all the facts and circumstances of this action.

That this Affirmation is based upon information and belief, the basis of which are records and documents contained in a file maintained by our office.

Your Affirmant submits this affirmation in opposition to the Motion for summary judgment on liability by plaintiff BERIAM ORTIZ and the cross motion for the same relief by co-defendant CAROL SHERMAN.

Defendant BARLOW previously submitted opposition to plaintiff’s motion and the defendant BARLOW respectfully refers and incorporates that as part of her opposition to the co-defendant’s motion for summary judgment.

To a certain extent, the affirmation of JOHN R. MARQUEZ, attorney for the defendant SHERMAN and the affidavit of defendant CAROL SHERMAN raise more questions than they answer and thus establish that there are serious questions of facts at issue that should not be resolved as a matter of law especially before depositions of the these three operators and parties to this lawsuit are conducted.

Ms. Sherman asserts that she was struck in the rear by Ms. Barlow's vehicle after she heard a crash behind her. See Exhibit A annexed to the affirmation of Mr. Marquez. However, this piece of information does not resolve any issue between Ms. Ortiz and Ms. Barlow as there is no description as to how this "crash" occurred or the events leading up to it.

Ms. Sherman states that she was driving along Bruckner Boulevard Expressway. However in what lane was she traveling? This becomes important based on the version of this accident as set forth by Ms. Barlow, indicating that the plaintiff may have been changing lanes prior to this accident.

Further Ms. Sherman states that she was in "slow moving traffic" but for how long? Was she moving at the speed limit and then suddenly started to travel in slow moving traffic? If there was a sudden change in speed of the traffic ahead of both Ms Ortiz and Ms. Barlow, it could dramatically impact their reactions to traffic in front of them and the happening of this accident and the causation for same.

Interestingly, Ms. Sherman confirms Ms. Barlow's description of the plaintiff as barefoot adding credence to Ms. Barlow's first sighting of the plaintiff as a driver extending a barefoot out her driver's window. See Exhibit A of the Affirmation in Opposition of Loretta J. Hottinger.

It is respectfully submitted that the more prudent course to the resolution of the liability issues raised in the 3 vehicle accident would be to obtain the depositions of all parties and then

engage in motion practice if the facts then appear clearer than they are now from the affidavits of the three operators and parties. At the very least, it appears premature for resolution of the liability issues as a matter of law.

WHEREFORE, your Affirmant respectfully prays that this Court deny the applications of the plaintiff Beriam Ortiz and co-defendant Carol Sherman for summary judgment on liability against the defendant Erin Barlow and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
May 21, 2008

LORETTA J. HOTTINGER, ESQ. SS # 4841

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

MARY DURNIN, being duly sworn, deposes and says:

Deponent is not a party to this action, is over the age of 18 years and resides at Metuchen, NJ.

That on the 28th day of May, 2008, Deponent served the within AFFIRMATION IN OPPOSITION TO MOTION OF PLAINTIFF AND CROSS MOTION OF DEFENDANT SHERMAN, upon:

JAY S. HAUSMAN & ASSOCIATES P.C.
Attorney for Plaintiff
BRIAN ORTIZ
280 North Central Avenue - Suite 40
Hartsdale, New York 10530

EUSTACE & MARQUEZ
Attorney for Defendant
CAROL SHERMAN
1311 Mamaroneck Avenue, 3rd Floor
White Plains, NY 10605

the address designated by said attorney for that purpose, by depositing a true copy of same, enclosed in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

MARY DURNIN

Sworn to before me this
28th day of May, 2008

NOTARY PUBLIC

Index #:07 CV 10365
HONORABLE
Justice

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DEFENDANT SHERMAN

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